SUPREME COURT, U. S.
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No. 79-1336

In the Supreme Court of the United States

OCTOBER TERM, 1979

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY
A CORPORATION,
Petitioner,

v.

KALO BRICK & TILE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

RESPONDENT'S BRIEF ON THE MERITS

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STATUTES & REGULATIONS

Interstate Commerce Act:

(Title 49 U.S.C. was revised by Public Law 95-473, October 17, 1978, without substantive change (49 U.S.C. §10101, et seq.) Since all cases cited in this brief refer only to the pre-revision section headings, the argument in this brief also refers to those section headings. The pre-revision sections are correlated here with the sections of the new revised Act.)

Pre-revision Act	Revised Act	
49 U.S.C. §1(4)	§10101(a)	5
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STATEMENT OF THE CASE

This action arises out of the Chicago and North Western Transportation Company's (hereinafter "CNW" or "Railroad") negligent failure to maintain its branch line to the plant of Kalo Brick & Tile Company (hereinafter "Kalo").

On September 13, 1974, Kalo filed its petition in the Iowa District Court. Kalo's amended petition alleged that because of the Railroad's failure to use ordinary care in maintaining its branch line track, the branch line became

unserviceable on April 4, 1973, which in turn forced Kalo to liquidate its assets and close in August, 1973.

Kalo's claim of actionable negligence was based upon the Railroad's common law duties made actionable by Section 479.122, Code of Iowa 1973; and its duty to furnish suitable car service pursuant to Section 479.3, Iowa Code 1973. Kalo also alleged common law tortious interference with contractual relationships.

Prior to the filing of Kalo's Petition in the Iowa District Court for Webster County, the Railroad filed on November 14, 1973, an application to the Interstate Commerce Commission for a certificate of public convenience and necessity permitting abandonment of the Kalo branch line based in part on the fact that Kalo as the only branch line user was out of business. Proceedings before the Commission were conducted at Washington, D.C., under the Commission's modified procedure. Kalo did not actively participate in proceedings before the Commission, as it had no interest in the restoration of service. Kalo did not appeal the Commission's order finding Kalo in default and permitting the abandonment, but rather proceeded with the action that was then pending in the Iowa District Court for Webster County.

The facts of the case are as follows:

For in excess of fifty years, Kalo relied upon the CNW and its predecessors in interest as its primary and principal source of transportation for its clay tile products. Kalo was initially serviced by the Minneapolis & St. Louis Railroad, which provided suitable car service until it was acquired by the Chicago and North Western Transportation Company in 1960. After the CNW took over the branch line serving the Kalo plant, service began to deteriorate. Beginning in 1961 and continuing into 1967,

the branch line serving the Kalo plant was intermittently out of service due to earth slides which damaged the track serving the Kalo plant. In 1967, the CNW leased and agreed to maintain a portion of the Fort Dodge, Des Moines & Southern railroad tracks which provided alternate access to the Kalo plant.

In March of 1973, ponded water was discovered around a portion of the CNW's leased track, which the Railroad admitted was contrary to sound maintenance practice. (J.A. 126). During the first few days of April, 1973, earth slides occurred along the leased track and other slides were developing because of improper maintenance procedures. (J.A. 91-92, 108).

On April 4, 1973, CNW notified Kalo that it could no longer provide cars at the Kalo plant because of the condition of the track and roadbed, notwithstanding the Railroad's prior commitment to maintain service to the Kalo plant. (J.A. 97). In fact, although the Railroad made verbal assurances of continued services to representatives of Kalo, they failed to even inspect the line during the five to six month period prior to the line's failure (J.A. 131), and furthermore, did not conduct any engineering or soil studies to determine what was necessary to maintain continued service. (J.A. 110-116, 120-121, 126-127, 135-136). The Railroad's failure to inspect, test or repair the Kalo branch line track was not brought to the attention of the Commission in the abandonment proceedings. (Def. Ex. YYY, Affidavits in support of abandonment application. R. 392, 394).

SUMMARY OF ARGUMENT

A. The doctrine of primary jurisdiction is not applicable because the question at issue falls within the conventional experience of judges and does not require special expertise to assure consistency within an administrative framework. *United States v. Western Pac. R. Co.*, 352 U.S. 59, 64-65 (1956).

B. The Commission's determination that the Railroad lawfully abandoned the Kalo branch line does not preclude Kalo from urging a contrary position in state court because: (1) the Commission did not have primary jurisdiction to determine the common operative facts, and (2) the Commission's order was entered in proceedings in which Kalo had no incentive to participate, its business having already been destroyed. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-331, n.20 (1979).

C. A state court has concurrent jurisdiction over state law damage claims as a cumulative remedy expressly preserved by Section 22 of the Interstate Commerce Act, where the claim for relief is outside the Commission's primary jurisdiction. *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121; *Eastern Ry. v. Littlefield*, 237 U.S. 140 (1915); *Illinois Central R.R. v. Mulberry Hill Coal Co.*, 238 U.S. 275 (1915).

ARGUMENT

A. The Interstate Commerce Commission Did Not Have Primary Jurisdiction To Determine Those Questions Of Fact Essential To Kalo's State Law Claims.

Although the Commission contends that the doctrine of primary jurisdiction is not squarely at issue because the Commission had the opportunity to consider Petitioner's abandonment application prior to trial in state court (Br. for *amicus curiae*, 20, n. 20), it nonetheless forms the predicate for an analysis of other issues. The common pivotal question underlying Kalo's state law claims of negligence and the Railroad's allegation of a lawful abandonment under federal law turns on the factual question of whether or not the abandonment occurred because of conditions beyond the Railroad's control so as to constitute a lawful embargo.[1] *ICC v. Chicago and N.W. Transp. Co.*, 533 F.2d 1025, 1027, 1028 (8th Cir. 1976); *ICC v. Chicago, Rock Island & Pac. R.R. Co.*, 501 F.2d 809, 911-913 (8th Cir. 1974), cert. denied 420 U.S. 972; *Johnson v. Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 400 F.2d 968, 971, 972 (9th Cir. 1968).

The doctrine of primary jurisdiction comes into play where a case raises issues of fact not within the conventional experience of judges or in a case where an administrative agency must exercise discretion to accomplish a congressional purpose. *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952). Whether or not a railroad abandoned a branch line for reasons beyond its

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1. If a lawful embargo is imposed a carrier is not liable in damages for the cessation of service under Sections 1(4) and 1(11) of the Act. *ICC v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d at 911.

control is a question not beyond the conventional experiences of judges. *ICC v. Chicago and Northwestern Transp. Co.*, 533 F.2d 1025, 1027, 1028 (8th Cir. 1976). Whether or not this case requires the exercise of administrative discretion so as to accomplish the congressional purpose raises a second question.

Under Section 1(18) of the Act, a railroad is absolutely proscribed from abandoning any portion of a line of railroad until there shall first have been obtained from the Commission a certificate that the public convenience and necessity permits such abandonment. Clearly, the Commission has primary jurisdiction to weigh the public convenience and necessity in formal abandonment proceedings. In such proceedings, an important but not wholly determinative consideration is whether or not the abandonment proposed is due to circumstances beyond the control of the railroad. Where, however, a railroad abandons a line without authority from the Commission by way of an *embargo, see, ICC v. Chicago and Northwestern Transp. Co.*, 533 F.2d 1025, 1027, n.2 (8th Cir. 1976), the *sole issue* for determination is whether or not the service was terminated by compelling circumstances beyond the control of the carrier. *ICC v. Maine Central R.R.*, 505 F.2d 590, 593 (2nd Cir. 1974); *ICC v. Chicago, Rock Island & Pac. R.R. Co.*, 501 F.2d 908, 911 (1974). Therefore, where the issue is whether or not the railroad lawfully *embargoed* a line, the factual determinations fall squarely within the conventional experience of judges and the doctrine of primary jurisdiction is not applicable because questions of transportation policy are not at issue.[2] *ICC v.*

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2. The reasonableness of a proposed abandonment is properly determined by the Commission's abandonment proceedings under Section 1(18) of the Act as where the principle consideration is application of uniform principles in the administration of national transportation policy. *See, Texas & Pacific Ry. v.*

(Continued on following page)

Chicago and Northwestern Transp. Co., 533 F.2d 1025, 1028 (8th Cir. 1976); *ICC v. Chicago, Rock Island & Pac. R.R. Co.*, 501 F.2d 908, 912-14 (8th Cir. 1974), cert. denied 420 U.S. 972 (1975); *See, ICC v. Maine Central R.R.*, 505 F.2d 590, 594 (2nd Cir. 1974); *Johnson v. Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 400 F.2d 968, 972-973 (9th Cir. 1968).

Kalo's petition was filed before the Commission authorized the abandonment and alleged that the cessation of service was due to the Railroad's negligent maintenance practices over which the Railroad had exclusive control. Therefore, the ultimate issue pending before the Iowa trial court was the same as was pending before the federal district court in *ICC v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, 912-914 (8th Cir. 1974), cert. denied 420 U.S. 972 (1975) where the *Commission* successfully argued that the doctrine of primary jurisdiction did not apply.

Footnote continued—
Abilene Cotton Oil Co., 204 U.S. 426, 440-442 (1907); *ICC v. Atlantic Coast Line R.R.*, 383 U.S. 576 (1966).

A determination of reasonableness is not necessary to or part of Kalo's claim because it is predicated on those facts on which the CNW based its alleged *embargo*. As an embargo relieves a carrier of liability only where it is imposed for compelling circumstances not within the control of the railroad, the determination is one of fact and not reasonableness. *ICC v. Chicago and Northwestern Transp. Co.*, 533 F.2d 1025, 1027, n.2 (8th Cir. 1976).

As a corollary, while the Commission's jurisdiction over abandonments is exclusive, *Alabama Public Service Commission v. Southern Ry.*, 341 U.S. at 346, n.7 (1951); *Colorado v. U.S.*, 271 U.S. 153, 164 (1926), the same conclusion does not follow for embargoes or damage actions arising out of the same facts, as a determination of reasonableness is not required.

B. Kalo's Claim Is Not Barred By The Commission's Order Permitting Abandonment Because: (1) The Commission Did Not Have Primary Jurisdiction Over Those Questions Common To Kalo's Claims; (2) Having Already Been Forced To Abandon Its Business, Kalo Had No Interest In Resurrecting Rail Service.

As an incident of the abandonment proceedings, the Commission decided that the abandonment was due to circumstances beyond the Railroad's control, and by implication that the Railroad's embargo was lawful. Other circumstances were considered as well, including the fact that Kalo as the only branch line customer was then out of business. Assuming, arguendo, that the Commission did not have primary jurisdiction to consider the lawfulness of the alleged embargo standing alone, *ICC v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, 912-914 (8th Cir. 1974), cert. denied 420 U.S. 972 (1975), then the assertion that the Commission's Order authorizing abandonment has a conclusive effect in subsequent judicial proceedings serves to indirectly extend the special or limited jurisdiction of the Commission beyond the allocation of power contemplated by the doctrine of primary jurisdiction. *United States v. Western Pacific R.R.*, 352 U.S. 59, 65 (1956). Stated otherwise, an incidental issue outside the Commission's primary jurisdiction should not conclusively[3] establish the principle issue in subsequent judicial proceedings, *United States v. United States Fidelity & Guaranty*

3. Petitioner and the Commission rely on *Ciba Corp. v. Weinberger*, 412 U.S. 640 (1973) for the proposition that state courts are bound by federal agency determinations. In *Ciba Corp. v. Weinberger*, however, there was no question as to the agency's primary jurisdiction with respect to the material issues before both the agency and the state court. Petitioner in *Ciba Corp.* had the incentive to and did vigorously participate in proceedings before the agency.

Co., 309 U.S. 506 (1940); *Anderson v. Pinkett*, 439 F.2d 619, 620 (D.C. Cir. 1971), lest an adversary choose an inconvenient and overly burdensome administrative forum[4] to foreclose his adversary. *Cromwell v. County of Sac*, 94 U.S. 351 (1877).

At first blush it may be gainsaid that Kalo should have vigorously protested the railroad's proposed abandonment before the Commission and appealed its adverse determination, or should have sought an injunction as was then permitted under 49 U.S.C.A. §1(20) (1970 ed.) or should have otherwise filed a complaint for damages with the Commission or in federal district court under Sections 8 and 9 of the Act. However, Kalo did not actively participate in the abandonment proceedings, or seek to enjoin the abandonment because it was already out of business, so that even if service was restored its business would not be resurrected. Instead, Kalo elected to pursue an alternative damage remedy in a local forum as contemplated by Section 22 of the Act as construed by *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915). Kalo's default in the abandonment proceedings admitted only that it no longer had an interest in continued rail service to its abandoned plant. Therefore,

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4. Kalo is not the only small business in its present predicament. The Senate Committee on the Judiciary in reporting the Equal Access to Justice Act stated:

> The Bill rests on the premise that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights. The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government. . . . S. Rep. 96-253, 96th Cong., 1st Sess. 1 (1979).

See also, H. R. Rep. No. 96-1005, Part 1, 96th Cong., 2nd Sess. 7 (1980); H. R. Rep. No. 96-1008, Part 1, 96th Cong., 2nd Sess. 13, 14 (1980).

neither the Railroad's allegations in its abandonment petition nor the Commission's findings of fact following Kalo's default should have collateral estoppel effect in the subsequent state court proceedings. *Cromwell v. County of Sac*, 94 U.S. 351, 356 (1877); 1B Moore's Fed Prac. ¶0.444, 4006-4007 (1980).

Collateral estoppel was considered from a different perspective in *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979), where this Court opted for a fairness analysis where the doctrine is asserted offensively. In *Parklane Hosiery*, this Court concluded that it may be unfair to bind a party in a suit where there was little incentive to vigorously defend. 439 U.S. at 329-331 (1979). Whether the first suit be for nominal damages or for administrative sanction of a *fait accompli*, it follows that without an incentive to vigorously participate, collateral estoppel may not be fairly employed to bar a nominal administrative adversary from seeking its only viable remedy in subsequent judicial proceedings. *See, Cromwell v. County of Sac*, 94 U.S. 351, 354-356 (1877).

An additional consideration bearing on fairness is the availability of procedural opportunities in the first and second proceedings. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-331 (1979). In the case *sub judice*, the Railroad initiated its abandonment proceedings before the Commission at Washington, D.C., forcing Kalo to defend in an inconvenient and procedurally foreign forum.[5] Under the Commission's modified procedure evidence was presented by verified statement and the matter was submitted without oral hearing. In contrast, in the state court proceedings, Kalo was permitted to take full discovery from the

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5. **See note 4, *supra*.**

defendant and conduct live cross-examination of hostile wiitnesses, all as a matter of right.[6] As a result of these procedural opportunities in state court, Kalo was able to elicit admissions of fact from the Railroad which were not brought to the attention of the Commission in the abandonment proceedings.[7]

C. The Remedies Provided By The Interstate Commerce Act Are Cumulative And In Addition To Those Existing Under State Or Common Law Over Which State Courts Have Concurrent Jurisdiction, Except Where The Commission Has Primary Jurisdiction.

A state court's concurrent jurisdiction under Section 22 of the Act is preempted only where the Commission has primary jurisdiction. The common question of fact incidently before the Commission in abandonment proceedings and before the state court in Kalo's negligence action, was whether the Railroad abandoned the Kalo branch line for reasons beyond its control. In such cases, the *Commission* has previously argued successfully that a court need not defer to the Commission on grounds of primary jurisdiction, because resolution of the question depends upon facts within the conventional experience of judges and does not otherwise require the exercise of administrative discretion to accomplish national transportation policy. *ICC v. Chicago and Northwestern Transp. Co.*, 533 F.2d

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6. See Restatement (Second) of Judgments (Tentative Draft No. 2, 1975) §§68, 88(2), (5), (6), (7). Kalo contends that the principles set forth in Section 88 of the Restatement should control as Kalo was not an opposing party as contemplated by Section 68.

7. *Compare*, Def. Ex. YYY, R. 392, 394 (Affidavits in Support of Abandonment Application), *with* J.A. 91-92 97; 108; 110-116; 120-121; 126-127; 135-136.

1025, 1028 (8th Cir. 1976); *ICC v. Chicago, Rock Island & Pac. R. Co.*, 501 F.2d 908, 911-13 (8th Cir. 1974); *ICC v. Maine Central R.R.*, 505 F.2d 590, 594 (2nd Cir. 1974). Where a court need not defer to the Commission's expertise regarding the application of federal law, the Commission *concedes* that state court jurisdiction is preserved under Section 22 of the Act in accordance with *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915); *Illinois Central R.R. v. Mulberry Hill Coal Co.*, 238 U.S. 275, 281-283 (1915), and *Pennsylvania R.R. v. Sonman Shaft Coal Co.*, 242 U.S. 120, 124-126 (1916) (Br. of *amicus curiae* at 24). *See, Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 442 (1907).

The Commiission and the Railroad also argue that Kalo's state law damage claim is preempted by the Interstate Commerce Act because it has the effect of regulating interstate commerce in a manner potentially inconsistent with the Commission's federal purposes. The argument is bottomed on the premise that the Commission's ultimate authority to allocate capital for branch line maintenance would be effectively undermined if railroads were forced to maintain unprofitable branch lines for fear of damage suits in state courts.

Kalo submits that a state law damage remedy in the circumstances of this case is consistent with and serves the interest of both the national interest in a uniform transportation policy, as well as the local interest in reliable transportation services. A private damage remedy cognizable in either state or federal court encourages a railroad to abandon lines in accordance with established federal procedures in contrast to private strategies of deferred maintenance and intentional neglect. *See, ICC v. Chicago and Northwestern Transp. Co.*, 533 F.2d 1025,

1027-1028 (8th Cir. 1976); *ICC v. Chicago, R.I. & Pac. R. Co.*, 501 F.2d 911, 912 (8th Cir. 1974); *ICC v. Maine Central R. Co.*, 505 F.2d 590, 593-594 (2nd Cir. 1974). Where, indeed, a branch line is unprofitable or otherwise unserviceable for reasons beyond the railroad's control, Section 802 of the Four R Act of 1976[8] provides for expedited abandonment procedures to assure that needless losses need not be sustained. Stated otherwise, neither the railroad nor the Commission need fear state law damage actions so long as branch lines are abandoned in accordance with established procedures. Where, however, a railroad, having an opportunity of avoiding private damage actions, chooses to ignore the available federal procedures and embarks upon its own course of intentional or negligent abandonment, the railroad and not the innocent shipper should suffer the monetary damages. *United States Express Co. v. Kountze Bros.*, 8 Wall. (75 U.S.) 342 (1869).

CONCLUSION

The Interstate Commerce Act has preempted state law only to the extent of the primary jurisdiction of the Interstate Commerce Commission. Courts need not defer to the jurisdiction of the Commission where the critical question turns not on issues of national transportation policy but on issues of fact within the conventional experience of judges. Where the question is without the primary jurisdiction of the Commission, its decision does not collaterally estop Kalo from asserting a contrary position in support of a cumulative and consistent remedy in a state court action. For these and the other reasons set

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8. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 127-130.

forth above, Respondent respectfully submits that the judgment of the Iowa Supreme Court should be affirmed.

Respectfully submitted,

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